In the

Supreme Court of the United States

VERMONT YANKEE NUCLEAR POWER CORPORATION,

Petitioner,

vs

No. 76-419

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,

Respondents.

CONSUMERS POWER COMPANY,

Petitioner,

vs

No. 76-528

NELSON AESCHLIMAN, ET AL.,

Respondents.

Pages 1 thru 66

Washington, D. C.
November 28, 1977

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

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CONSUMERS POWER COMPANY, Petitioner, v. NELSON AESCHLIMAN, ET AL., Respondents.	No. 76-528

Washington, D. C.,

Monday, November 28, 1977.

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THOMAS G. DIGNAN, JR., ESQ., 225 Franklin Street, Boston, Massachusetts 02110; on behalf of Petitioner, Vermont Yankee Nuclear Power Corp.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of Respondent, Nuclear Regulatory Commission

CHARLES A. HORSKY, ESQ., 888 - 16th Street, N. W., Washington, D. C. 20006; on behalf of Petitioner, Consumers Power Company

ICHARD E. AYRES, ESQ., 917 - 15th Street, N. W., Washington, D. C. 20005; on behalf of Respondents, Natural Resources Defense Council, Inc., et al.

MYRON M. CHERRY, ESQ., One IBM Plaza, Suite 4501, Chicago, Illinois 60611; on behalf of Respondents, Nelson Aeschliman, et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 76-419, Vermont Yankee Nuclear Power v. Natural Resources Defense Council, and the consolidated case, Consumers Power, No. 76-528.

Mr. Dignan, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS G. DIGNAN, JR., ESQ.,
ON BEHALF OF PETITIONER, VERMONT YANKEE NUCLEAR
POWER CORPORATION

MR. DIGNAN: Mr. Chief Justice, and may it please the Court:

I represent Vermont Yankee Nuclear Power Corporation, the petitioner in No. 76-419, and my argument will be confined to that case and the issues which are raised therein.

This matter comes before this Court on a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. That court has before it two actions of the United States Nuclear Regulatory Commission.

First, the action of that Commission in granting an operating license to the Vermont Yankee Nuclear Power Station, a nuclear electric generating station located in Vernon, Vermont, and owned by my client, Vermont Yankee Nuclear Power Corporation, the petitioner.

In addition, it had before it the promulgation by that agency of a regulation which for the first time permitted

in individual reactor licensing cases limited consideration of the environmental effects of the separately licensed and located facilities where the various matters such as reactor fuel manufacturing and reprocessing and waste disposal activities take place. These activities are sometimes referred to and I will refer to them as the fuel cycle activities.

By its judgment, the United States Court of Appeals struck down the agency's regulation on the ground that insufficient procedures had been utilized in its promulgation. The court also remanded the agency decision authorizing the issuance of an operating license to Vermont Yankee on the grounds that issuance of any such license had to be preceded by what the court called a thorough "ventilation" of the environmental effects of the fuel cycle activities.

Now, though procedurally complex and as laid out in detail in our brief at pages 11 through 25, this case I respectfully submit is substantively quite simple. The result below was --

QUESTION: Before you proceed, Mr. Dignan, may I ask you a question. The respondents say in their supplemental statement of facts that your client, Vermont Yankee, has now been granted an operating license and that the time to seek review of that license has expired without a petition for review being filed. Is that correct?

MR. DIGNAN: Mr. Justice Stewart, we have an operating

license but that operating license at this time is good for 18 months only, to wit, the duration of the so-called interim rule which the Commission has adopted. I do not believe this case is moot, which is being suggested by this late filed brief, because when Vermont Yankee went into the Court of Appeals, Vermont Yankee had a full-term forty-year license. We have a license now under this interim rule but --

QUESTION: When you came out of the Court of Appeals, you had nothing?

MR. DIGNAN: We came out of the Court of Appeals, we had a remand of the decision authorizing the license.

QUESTION: And now you have a license?

MR. DIGNAN: Now we have a license, which license is given to us under the interim rule which self-destructs in 18 months, therefore I do not --

QUESTION: And at the end of 18 months?

MR. DIGNAN: The question then will be whether or not there is a new rule in place as to whether Vermont Yankee's license would continue or whether the Commission takes some other action. But it is our position that Vermont Yankee had a good forty-year license at the start and that this Court should enforce that initial decision of the Commission, that Vermont Yankee should not have to litigate further for its full-term license.

Now, as I indicated, I believe this case is quite

simple substantively. To begin with, the Court of Appeals struck down an agency regulation on the basis that the National Environmental Policy Act is to be construed as in effect amending the Administrative Procedure Act to require all agencies to provide more than the notice and comment proceedings called for in 5 U.S. Code, section 553, in any rulemaking proceedings which affect the environmental responsibilities of the agency.

Second, the Court of Appeals remanded the petitioner's license as the result of a holding that the National Environmental Policy Act should be read as amending the Atomic Energy Act in substance by saying that the technical and economic resolution of the so-called high-level nuclear waste question should be undertaken and indeed essentially resolved as to methodology prior to the issuance of any more reactor licenses.

Now, third, the Court of Appeals accomplished all of this through the device of utilizing extra record evidence which was never presented to the agency in either the Vermont Yankee case or the rulemaking proceeding; indeed, it consisted of articles that were written after the rule was promulgated and in one case after the case was argued to the Court of Appeals which were utilized to set up a conflict with theretofore uncontested expert testimony of an agency staff member. And having done that, the Court of Appeals then held that the rule was not well supported as a result of procedural

misfeasance.

Now, we believe the decision to be in error for a number of reasons, as set forth in our brief. In the first place, I respectfully suggest that this decision is flatly contrary to the Administrative Procedure Act and the National Environmental Policy Act as interpreted by this Court.

In its decision, the Court of Appeals admits that the requirements of section 553 of the Administrative Procedure Act were exceeded in this case, and indeed they, of course, were. There was an opportunity for comment. There was an oral hearing, an opportunity for comments on the comments, and an opportunity after that for comments on the comments on the comments.

QUESTION: By exceeded, you mean there was more than adequate compliance?

MR. DIGNAN: That is our view, Mr. Justice Stewart.

QUESTION: And that you say was the Court of Appeals' view?

MR. DIGNAN: Well, the Court of Appeals said that we exceeded the requirements of section 553 but that that was not enough to comply with the Act. And it is our belief that the prior decisions of this Court have indicated that section 553 means precisely what it says.

Also this Court has indicated that the National Environmental Policy Act cannot be read as amending other statutes, and therefore to the extent that the court below was

saying that the National Environmental Policy Act works was essentially an amendment of the Administrative Procedure Act, I believe the decisions of this Court in the scrap cases precludes such a holding.

We also submit that this decision transgresses the rulings of this Court in the recent Kleppe case. The Kleppe decision stands for the proposition that feasibility and practicality have to govern in some respect the working of the National Environmental Policy Act and the scope of an agency's responsibility thereunder.

As is clear from this record, two boards of this agency, both of which had a majority, two members who were technically trained people, found that it was essentially a practical impossibility to consider in detail in an individual reactor licensing proceeding the activities that would take place at a fuel cycle proceeding yet to be applied for.

In addition, these two boards ruled as a matter of law that the proposal before them, as that term is used in NEPA, was the licensing of Vermont Yankee, not the licensing of these other facilities; therefore, these boards ruled, we need not get into this at all.

I respectfully suggest those rulings, though much earlier than, are entirely consistent with this Court's rulings in the Kleppe case.

We also maintain that this decision basically

contravenes a long history which shows an intent in Congress that the solving of the so-called high-level waste problem is not a matter that must precede the issuance of reactor licenses. This is laid out in our brief in some detail, but it is clear that what this Court wanted was the waste problem to be solved.

And I would note that at page 78 of the appendix, Judge Tamm says it flatly. He says, "I agree with the majority that NEPA requires the Commission fully to assure itself that safe and adequate storage methods are technologically and economically feasible."

And I suggest to this Court that the history in Congress is that Congress has been aware since 1954 that the final selection and the final decisions in this matter have not been made and Congress has made no move to stop the licensing of reactors.

Now, essentially what is argued in response to these various arguments: In response to Mr. Justice Stewart earlier, I addressed this question of whether the cases become moot.

A second argument that is made to this Court is this is just a record case, that the court below just found the record inadequate and it is really not worthy of this Court's attention.

I can only quote what the court itself said the issue before it was. It said, "Thus we are called upon to decide whether the procedures provided by the agency were sufficient

to ventilate the issues." That is what they thought they were deciding in the rulemaking case, and I submit that that is what they did decide and decided it erroneously.

QUESTION: You would concede, would you not, Mr. Dignan, that there is some ambiguity in the opinion of the Court of Appeals, particularly when viewed in the light of the concurring opinion?

MR. DIGNAN: I would be less than candid with this Court if I did not admit that this opinion admits of different readings by different people. On the other hand, I would remind this Court that to let this decision stand, I respectfully suggest, means chaos in the administrative process of the United States at this time, not only in this agency but in other agencies, because no agency can now be sure precisely what it must go through in order to promulgate a valid rule.

QUESTION: In order to have sufficient ventilation and sufficient dialogue?

MR. DIGNAN: If ventilation even be a requirement, ventilation in this opinion to be is one of the most catchy words that is about to find its way into American jurisprudence, and I think it should not be allowed to because I don't know how to construct this ventilator, and I am not sure that anyone at an agency will know precisely how to construct this ventilator.

QUESTION: But you would certainly think it is the

agency's job to construct it, I gather, rather than the court?

MR. DIGNAN: No, I think the ventilator has been constructed by the Congress, Mr. Justice.

QUESTION: Well, I know, but you wouldn't think that the agency broke the law by going through the procedures it went through here for the rulemaking?

MR. DIGNAN: No, I think the agency complied fully with the law, Mr. Justice.

QUESTION: Yes. Well, more than that, it went farther, you say, than it was required.

MR. DIGNAN: That is correct, and therefore this is why we think this decision is in error.

QUESTION: Mr. Dignan, supposing that the Court should conclude that you are right on the procedural issue but that the record was inadequate on the question of waste disposal, what should the Court do?

MR. DIGNAN: Insofar as my client is concerned, Mr. Justice, I think a remand with a direction to affirm the Vermont Yankee decision is in order certainly, because my client's right to that license I suggest does not depend on valid rule. I think our license was validly issued without the rule.

If the Court concludes there is a problem with the record, I think the most that should be done is to ask the agency for a further statement of bases and purposes, because

I think that is the only record required.

In notice and comment, it may well be that no comments are made, so what the Congress must have intended is that the statement of basis and purpose be all right as far as a reviewing court is concerned. So I think the most that is necessary here is a remand for further explanation.

QUESTION: An agency certainly doesn't have to marshal its own evidence under a notice and comment proceeding, does it? It is presumed to have the expertise.

MR. DIGNAN: I believe that is correct, Mr. Justice, it is not required to marshal it, and it is not required to answer every single statement that is made to it either by somebody outside the agency, and I think that that is another danger in this decision.

What this decision means is that if any person comes in with any difference of opinion, he can send a federal agency into years of study to strike down what they in their expert judgment have already decided is not necessary to consent.

QUESTION: Well, has the agency done anything since the Court of Appeals opinion to effect the adequacy of its record?

MR. DIGNAN: What the agency has done is hold an interim rule proceeding which really consisted of a further literature search. They certainly have engaged in no additional

procedures, Mr. Justice, but they have had an additional literature search which backs up this new interim rule. This interim rule, as is clear from the briefs, is on appeal in the United States Court of Appeals for the District of Columbia Circuit. It is also on appeal because of the Vermont Yankee decision and the Seabrook decision, has brought to the First Circuit. I would imagine the First Circuit will hold in abeyance until such time as either this Court speaks or the D.C. Circuit speaks after this Court speaks.

QUESTION: Well, suppose we agreed with you on the procedures, but then there is the question of the adequacy of the record, and there is a further proceeding going on now in the Court of Appeals with respect to the validity of the interim rule?

MR. DIGNAN: A petition for review has been filed and at the request of the petitioners in that case is being held in abeyance until this Court acts.

QUESTION: Why should we address ourselves to a situation that no longer exists? I mean, the record that the Court of Appeals in this case spoke about is not the record that now exists.

MR. DIGNAN: As far as Vermont Yankee is concerned, of course, Mr. Justice White, it is precisely this record, and so far --

QUESTION: That is because you say the rule has no

impact on your case.

MR. DIGNAN: That is my belief. And as to the agency, while it may be true that there has been a change here, I submit to this Court that it is unlikely that case will reach this Court until after the 18-month rule has expired, and I suggest we have got chaos in the agency until it does reach this Court.

QUESTION: Well, let's suppose that tomorrow the Court of Appeals upheld the interim rule?

MR. DIGNAN: The Court of Appeals will not speak on the interim rule until this Court speaks.

QUESTION: I understand that. I said suppose that it did and upheld the interim rule?

MR. DIGNAN: That would solve the problem, but I must say I consider that highly unlikely because the interim rule is on the same procedures as the rule that is --

QUESTION: I know, but let's assume that the procedural matter rests. Suppose the Court of Appeals were told that their procedural approach to the case was wrong.

MR. DIGNAN: Then that would be this Court's --

QUESTION: Do you suggest necessarily the Court of Appeals would find the record in the case now before it inadequate?

MR. DIGNAN: No. I think if this Court instructed the Court of Appeals that its procedures were wrong, the result

would be that they would uphold the interim rule.

QUESTION: That is what I thought.

MR. DIGNAN: But maybe I misunderstood you, Mr. Justice. I thought you were assuming this Court did not speak on the subject.

I see that my time is up, and I thank the Court.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF RESPONDENT, NUCLEAR REGULATORY COMM.

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

The Court of Appeals decision here came in the course of an evolving process of how the Commission has been handling the licensing of nuclear power plants. There is some 65 presently in operation in the country, some of which received their licenses, including their operating licenses, prior to the passage of the National Environmental Policy Act in 1969. And the process has evolved considerably since the Court of Appeals decision in this case, and I will explain that briefly.

At the time that Vermont Yankee's operating license was issued, the Commission took the position that it would give no consideration to questions of reprocessing and waste management and disposal during the licensing proceedings, although shortly thereafter it adopted the 1974 Fuel Cycle Rule, in which

in recognition of the fact that waste problems are irretrievably set in motion by the granting of a license to a plant, it decided that it should factor in to the extent that it is possible to do so some environmental values reflected in the management and disposal of waste and reprocessing in the licensing proceeding.

QUESTION: Mr. Wallace, do you know without reference to the record when Vermont Yankee's license was originally issued?

MR. WALLACE: The operating license?

QUESTION: Yes.

MR. WALLACE: I believe it is 1972. And the rule that the Court of Appeals set aside, the fuel cycle rule, was adopted in 1974, and --

QUESTION: Well, how can that affect Vermont Yankee's license that was issued in '72?

MR. WALLACE: Well, as a matter of fact, it did not. At that time, the Commission decided that that rule would be applied prospectively only and not to existing licenses such as Vermont Yankee, because the values reflected in the table to be applied under that rule were not significant enough to be likely to affect the balance, the cost-benefit balance that had been determined in measuring the environmental effects of these licneses.

QUESTION: What would happen then if the Court or we

had not granted certiorari and the Court of Appeals decision had been left standing, would that have had some effect on Vermont Yankee's 1972 license?

MR. WALLACE: Well, the Court of Appeals set aside the grant of the license.

QUESTION: On what grounds?

MR. WALLACE: On the ground that it had been done without taking into account waste reprocessing and disposal, and --

QUESTION: Is there a statutory limitation period on the time to appeal from the grant of a license such as was granted in '72?

MR. WALLACE: Well, I am sure there is but no one to my knowledge contended that the setting aside of the license was untimely here. It was part of the Court of Appeals' order. There is a portion of the opinion devoted to setting aside the license as well as a portion devoted to setting aside the rule. And what the Court of Appeals held was that it was proper to proceed under a valid rule and to take account of this environmental factor which, after all, is a generic factor. We are not talking about the particular reprocessing or disposal facilities when we are dealing with these individual licenses, that it was proper to do this by a valid rule, but that this wasn't a valid rule and that in the absence of applying a valid rule, the licensing proceeding was invalid for not having taken

this factor into account, and both aspects of this case were remanded to the Commission.

Now, insofar as this remand was based on a finding of inadequacy of record, which was the sole basis in Judge Tamm's concurring opinion, and arguably a or the basis elsewhere, the matter is from the Commission's standpoint largely academic now.

The 1974 rule has been replaced by the interim rule to which we refer on pages 30 and 31 of our brief, and the Commission has now undertaken to replace the interim rule with a permanent rule.

Moreover, the interim rule has been applied to the Vermont Yankee case in the decision of July 18, 1977, by the Commission's Appeal Board. That is reprinted as a supplement to a supplemental brief just submitted by the respondent in the case. And in that decision, the Appeal Board determined that the values in the revised table to be used in the interim rule when applied to the Vermont Yankee application do not tip the balance of costs and benefits previously determined in the environmental survey done there. And the Commission's Appeal Board reached the same conclusion with respect to eleven other facilities in a decision in August of this year, 6 Nuclear Regulatory Commission, 206. The decision involving Vermont Yankee appears at 6 Nuclear Regulatory Commission, page 25.

QUESTION: Mr. Wallace, could I interrupt with a

question? What is the position of the government as to whether or not the record was adequate with respect to Vermont Yankee?

MR. WALLACE: We have not taken a position on that in this case.

QUESTION: But don't you have to take a position in order to tell us whether to reverse or affirm?

MR. WALLACE: Well, we really think from our standpoint it no longer matters, we don't see any reason why the Court need make that determination. We have lodged with the Court the environmental survey on which the new interim rule was based, devoted entirely to questions of reprocessing and waste management.

QUESTION: Don't we have to decide the case though? Don't we either have to affirm or reverse, and if we agree with you and with Vermont Yankee on the procedural question, don't we necessarily have either to decide it or dismiss the writ as improperly granted, one or the two? I mean, we have to act, we can't just say it is an academic problem.

MR. WALLACE: That is correct. But for purposes of Vermont Yankee's application, we have already applied the interim rule and are intending to complete our rulemaking proceedings and to apply the permanent rule to Vermont Yankee, so that that aspect of the case is no longer of concern to the Commission's procedures. And I think the Commission would have the authority to proceed that way, regardless of whether this

Court were to disagree with the Court of Appeals about the adequacy of the record.

QUESTION: Except that if we reversed the Court of Appeals, you don't need any further proceedings in the Vermont Yankee case because the forty-year license will be in effect.

MR. WALLACE: We won't need them but we are going to proceed with them.

QUESTION: Well, how could you proceed with them with respect to Vermont Yankee? They've got their license. Won't they just stay home and not come to your hearings?

MR. WALLACE: The Commission does have the authority to apply the interim rule to existing licenses when issues have been raised about the fuel cycle effects on the environment with respect to them.

QUESTION: Where does that authority come from?

MR. WALLACE: Well, I would have to refer to the statutory authority.

QUESTION: Supposing you have a license, a forty-year license issued in 1965 and no grant of authority to the Commission in terms to reopen for this reason, do you think the Commission can just reopen and reconsider the license without any mandate from Congress?

MR. WALLACE: It has not attempted to do so. It has not attempted to do so.

QUESTION: But you just said it could. You said it

could reconsider a --

MR. WALLACE: I said it could with respect to this one because it is still being contested.

QUESTION: But it is a '72 license and the time for contesting may well have expired before any proceedings were brought.

MR. WALLACE: Well, should that issue be raised, the Commission would have to address it. We just have not. We have not. We are planning to go ahead with the rulemaking proceeding that is now under way and, as I say, the interim rule is based on a much more substantial evidentiary survey devoted entirely to waste management and disposal and reprocessing issues than was the basis of the rule that the Court of Appeals set aside and which is no longer in effect so far as the Commission is concerned.

QUESTION: What is the date of that last document?

MR. WALLACE: Of the Commission's interim rule? That was adopted -- I don't recall, but it is very --

QUESTION: What is its date in the sequence of --

MR. WALLACE: March '77, I am told. It is relatively recent and it is to be in effect for 18 months.

Now, what the Commission is concerned about, however, is the procedural holding of the Court of Appeals because in adopting the interim rule it followed the statutorily prescribed procedures of section 553 of the Administrative

Procedure Act, rather than afford additional procedures which the Court of Appeals held in hindsight had been required in the other rulemaking proceeding, although the Court of Appeals never spelled out what those procedures should be. And with respect to the new rule to be adopted, the Commission is not proposing to engage in an adjudicatory type of rulemaking with rights of discovery and cross-examination. It has invited the participants to suggest questions and follow-up questions for the Board to ask witnesses at the hearing to be held in connection with the new rule, but there are practical reasons why the Commission chooses not to proceed in an adjudicatory manner as no statute requires it to do.

With respect to the 1974 rule, there were some forty individuals and organizations who participated, and the Commission anticipates that at least as large a number will be concerned with the hearings with respect to the new rule. It has already received comments and proposed questions and follow-up questions which are quite voluminous, and there are practical limits to the use of an adjudicatory process in a rulemaking proceeding of this kind if the distinction between rulemaking and adjudication is to perform the function that was conceived for it under the Administrative Procedure Act.

For that reason, the Commission is concerned with the holding of the Court of Appeals here and what it portends for the Commission's ability to proceed through rulemaking with

what the Commission considers to be more appropriate responses to these problems in the licensing of plants, and it believes that the procedural holding of the Court of Appeals based as far as we are able to tell purely on the Court of Appeals' dissatisfaction with the results that were reached in the 1974 rule, rather than with any infirmity that it could point to in the proceedings adopted from the perspective of the time when the Commission adopted them should be set aside.

Indeed, there was no showing to the Commission that any particularized need for discovery or cross-examination with respect to any of the issues with which the Court of Appeals later decided the record was inadequate.

Now, I should say that the interim rule has not yet been applied to the Midland Power facility involved in the companion case, the Consumers Power case, but its application is pertinent to a proceeding that is presently pending before the Appeal Board, and it is anticipated that the interim rule will be applied in that proceeding in the same way.

In that case, the Court of Appeals found two additional shortcomings in the Commission's proceedings which we have dealt with in our brief and which Mr. Hosky will deal with in his argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wallace.

Mr. Horsky.

ORAL ARGUMENT OF CHARLES A. HORSKY, ESQ.,

ON BEHALF OF PETITIONER, CONSUMERS POWER CO.

MR. HORSKY: Mr. Chief Justice, and may it please the Court: I represent the petitioner in No. 76-528, Consumers Power Company.

This is a challenge to a construction license, rather than an operating license. In the Court of Appeals opinion in this case, they incorporated by reference their decision in the Vermont Yankee case and, for that reason, I join in what has been said by Mr. Dignan and Mr. Wallace in urging a reversal of that decision, but on that issue I would prefer to rest with what has been said and go on to the other two issues which were involved in the Midland case.

Those two issues involve two separate grounds which have nothing to do with the fuel cycle issue. The first is whether the Commission, whether the licensing board in granting the construction license adequately dealt with what I might shorthand call conservation of energy alternatives to the grant of the construction license. The other is whether the report of the Advisory Committee on Nuclear Safeguards, which is one of the statutory requirements for the hearing and grant of a license, was adequate. Let me take them up in turn.

First, with respect to the so-called energy conservation issue: It is a NEPA issue, did the licensing board properly consider the alternative to the plant of energy

conservation. We submit that it did.

The procedures started with an environmental impact statement which covered all of the various categories, all of the various considerations, and attached to it for circulation and ultimate hearing were some 119 energy or environmental considerations propounded by an intervenor called Saginaw. That draft environmental impact statement report was then the subject of hearings, adjudicatory hearings, cross-examination preceded by discovery and all the rest. They lasted for 14 days.

It is perhaps worth noting that the Saginaw intervenor who propounded the considerations failed to participate in those hearings, but those hearings developed in detail the need for the project, a conclusion which was supported by the Michigan Public Service Commission, the Federal Power Commission, and the Environmental Protection Agency.

The controversy relates to some 17 of these 119 environmental contentions propounded by Saginaw which are said to be, although the words were not used, energy conservation contentions. Some of them were dealt with by the Licensing Board specifically. For example, it considered and found that there was no basis for holding that the Consumers Power had artificially enhanced the requirements for electricity and therefore distorted its demand figures.

The Licensing Board did decline, however, to consider

a number of Saginaw somewhat rhetorial contentions dealing with in general whether or not it would be proper to set limits on the uses of electricity or, as the Licensing Board put it, whether we should consider whether the present customary uses of electricity in our society are proper or improper.

The Appeal Board affirmed that decision, but that wasn't the end of it. While the petition for review was pending in the court below, the intervenors asked that the hearing before the licensing board be reopened on the ground that the Commission in the meantime, in a decision called the Niagara Power decision, had said things which were inconsistent with the decision of the Licensing Board. That motion to reopen the hearings was passed upon, ruled upon by the Commission itself in a long careful opinion. In that opinion, it reviewed each of these 17 contentions and set forth in careful studied words why it believed the Licensing Board was correct in not having to consider the contentions which were urged with respect to energy conservation which the Licensing Board did not consider.

QUESTION: Mr. Horsky, somewhere along the line of these procedures, wasn't the point made that one of the customers, Dow Chemical, would no longer need the power to be supplied by this --

MR. HORSKY: Well, at one point during the course of the proceedings, a motion was made to reopen the hearing on the

ground that the contract arrangements between Dow and Consumers had been modified.

QUESTION: Yes.

MR. HORSKY: The Commission heard that decision or heard that contention and reviewed the contracts and said that there was no basis upon which the decision should be changed insofar as Dow was concerned.

QUESTION: And chronologically, when was that done, about the same time it considered these 17 questions?

MR. HORSEKY: All I can say is that since that time there have been no substantial changes in the Dow-Consumers relationship. The Court of Appeals in its decision said you might re-look at those questions, but, as we point out in our reply brief, the situation with respect to Dow is essentially the same as it has been since the time the Commission itself re-examined the issue and decided that there was no basis for modification of its decision. I think the Dow question can be put to one side, Your Honor.

What is clear in this record, it seems to me, is that there is a need, a clearly demonstrated need for the power that this plant is to generate, and it also seems to me that the Commission was quite correct in saying the Licensing Board did not need to consider the kind of contentions, for example, and I quote, "the possibility of changing the present social stimuli to society which could result in a decreased demand

for electricity, or another one, that Dow Chemical should be denied electricity in order that it would be encouraged to develop power sources "from other sources not now known to man."

I think the Board was correct in saying that those kinds of contentions did not require the Licensing Board to go into them in detail. That is not to say that the Board didn't have a responsibility for determining that there was a need for the power to be generated. Of course it did, and it went into that in great detail, examining the demand statistics which were presented in very great detail to it.

What it is to say is that under NEPA the Commission, it seems to me, was entirely warranted in saying that the intervenors who were challenging the demand and suggesting an alternative to the plan had the responsibility for developing something more specific than the kinds of things that I have just suggested, with reasonably specific conservation measures which, as the Commission put it, would require reasonable minds to inquire further. That is the threshhold test which the Court of Appeals found so arbitrary and capricious. It seems to me that it is anything but that.

Now, let me mention again what Mr. Wallace adverted to briefly in his argument. This decision was made in 1972, this decision to grant the construction license. At that time, both NEPA and indeed the nation's concern for proper

conservation of energy were certainly in a developing state, in a different state than they are today. The guidelines set out by the Council on Environmental Quality for the first time in 1973, a year after the decision, suggested that the environmental impact statement should address energy conservation alternatives. The Federal Power Commission in 1973 for the first time suggested that in consideration of a license for a hydroelectric plant, the alternatives of conservation ought to be considered.

I think under the circumstances in this case, and given the time at which the decision was rendered, the Licensing Board acted properly with respect to these energy conservation measures.

The other issue is, as I say in the brief, almost a contrived one, but it was the basis of a further order by the court below that we go back to the Licensing Board again. This is the alleged inadequacy of the report of the Advisory Committee on Reactor Safeguards. That committee is a 15-member part-time group of distinguished scientists who are charged by the statute to advise the Commission and to examine and to advise the Commission on the preliminary safety analysis report. The advisory committee did in fact do that. It filed a letter with the Commission pointing out certain problems which it thought the staff should address, and then it said other problems involving light-water nuclear reactors are set

forth which we think the staff should address -- are set forth in our earlier reports on light-water nuclear reactors.

The Court of Appeals said that cross-reference requires that this case be remanded because the Licensing Board should have sent it back and asked the advisory committee to specify the other factors which the advisory committee said the staff should consider, and do it in language intelligible to a layman, whatever that means in this context.

These other reports of the advisory committee were, of course, known to the Commission and to its staff. And incidentally, if there is any question about whether the staff was confused, the reply brief filed by the government I think clears up the contention that the staff was confused.

The other reports were on file in the public document room of the Commission. Anyone who wanted to go look for them could have gone to look for them.

It seems to me that to say that that kind of a mistake, if it was a mistake and it doesn't seem to me to be one, it was the customary form of the letter of the Advisory Committee, doesn't warrant sending this case back to square one which is where we will be before the Licensing Board, if this decision stands. That we think is just judificial interference run dry.

We set out, and I think it is relevant, in our brief at some length the procedures which precede the issuance of a

construction license for a nuclear plant. The application by the applicant is an enormous document. It is reviewed and reviewed and reviewed by the staff. That is the first step. The safety aspects are considered by the Advisory Committee. Then there is a full adjudicatory type hearing on the safety and all other aspects of the plant, preceded as it was in this case by elaboratory discovery. On the basis of that record, the Licensing Board makes its findings, that is, spells them out in detail. That record is also the subject of what amounts to a de novo review to an appeal board.

QUESTION: This is an adjudicatory hearing under ADA, I take it?

MR. HORSKY: Oh, yes, a full adjudicatory hearing, full discovery, full cross-examination, and very lengthy, and the decision by the Appeal Board is in turn subject to review by the Commission itself, as was the case in the NEPA issues.

I think the intervenors probably would like it otherwise, but the fact is that Congress has, as Mr. Wallace said, decided that nuclear power should be used for electric power production. It did so in the Atomic Energy Act, it reaffirmed that in the Energy Reorganization Act of 1974. It realized that it has hazards as well as benefits, but it went ahead.

The Commission has been equally responsive to the hazards. And I think what has developed from the statutory

requirements and from the Commission's regulations is probably the most elaborate, the most detailed, the most comprehensive administrative machinery that was ever devised to determine whether or not government approval or disapproval should come from an application of a private project.

And what the court below has done in these two cases is to interject itself into that procedure. It sets this proceeding back nine years. This application was filed in 1969. The license was granted in 1972. Under the decisions of the Court of Appeals, we go back to the Licensing Board for further hearings and it will be through the appellate process, the Appeal Board and all of the rest of it, up to the Court of Appeals again.

We had a valid construction license until the Court of Appeals acted. We hope that this Court will reverse the decision below and give us our construction license again.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Horsky.

Mr. Ayres.

ORAL ARGUMENT OF RICHARD E. AYRES, ESQ.,

ON BEHALF OF RESPONDENTS, NATURAL RESOURCES

DEFENSE COUNCIL, INC.

MR. AYRES: Mr. Chief Justice, and may it please the Court:

I would like to address the issues in the Vermont

Yankee case, and Mr. Cherry will follow me and address the issues in the other case.

I think the respondents in this case would like to make two points clear at the outset that do not seem to have been accorded much importance in the presentation that you have heard.

The first is that this case arises or these two cases arise under the National Environmental Policy Act. The National Environmental Policy Act, as this Court has said, has two purposes. One is that to require disclosure by government agencies who are considering going forward with a project to other decision-makers and to the public in general, with the theory being that disclosure will tend to produce better decisions, less-environmentally damaging decisions. The other is that by requiring the presentation of an environmental impact statement, NEPA is designed to encourage agencies to exercise foresight, to foresee the long-range consequences of the things they undertake for short-range benefits. And we think the issues that were involved in the Vermont Yankee case are classic instances of how important that requirement is.

QUESTION: Speaking of foreseeing long-run consequences, Mr. Ayres, it is your brief, I believe, that bears the clerk's stamp of November 26th, the supplemental statement of facts?

MR. AYRES: Yes, this is a supplemental statement of facts.

QUESTION: Is there any reason why that came in so late?

MR. AYRES: Well, there was a great deal of thought given to whether that issue should be raised, and I am afraid I accept some blame for having not provided that material to the Court earlier. We do think it is relevant, however, to the decision and would have wanted to submit it at whatever time.

The issues, as I said, that are raised in the litigation --

QUESTION: Just before you leave that supplemental statement of facts, you state that the Vermont Yankee Nuclear Power Station has now been granted a full-term operating license. Your brother said that it was in effect an 18-month license.

MR. AYRES: Well, I think if you look at the opinion by the Commission in this case, you will see that their position is first that the Vermont Yankee should have a license under the interim rule --

QUESTION: Right, which is the 18-month rule.

MR. AYRES: Yes. And second, that had this case come before them in 1971, they would have come to the same conclusion because essentially of the fact that the plant was built and operating, essentially because of the costs involved.

QUESTION: Well, they did come to the same conclusion

for a forty-year license back in 1973.

MR. AYRES: But they did that in the absence of any consideration of the waste issues at all. What they are saying in this decision is, when we consider the waste issues as we see them, then we still conclude that the plant should be licensed, and I think that we can also anticipate for certain that when a final rule is promulgated, the same decision will be applied, given the reasoning in that opinion. So we think that as to Vermont Yankee, the issue of whether Vermont Yankee can operate with its license is really a settled issue, and that is the issue on which the court granted cert. And there was, as you recall --

QUESTION: Well, that is all that Vermont Yankee wanted, and they have got it --

MR. AYRES: That's right.

QUESTION: -- if they do have a forty-year license. But the fact is they have a license under the interim rule, which is an 18-month rule.

MR. AYRES: Well, there may be some room for interpretation there and we, of course, do not make any statement of position when we brought this to the Court's attention. But we think it is clear, if one looks at the reasoning there and also at the rule that is being proposed as a final rule, which is essentially the same as the interim rule, and which again is essentially the same as the rule that was under review in

this case, that Vermont Yankee's license is free and clear. And frankly, from the position of those parties who challenged it in the beginning, my clients, we have no quarrel with that. The issue that we are concerned about is the way the Commission has dealt with the nuclear waste problem, its refusal to make available to the public information about the situation, and that issue now have moved into the arena of the S-3 table proceedings --

QUESTION: The rule-making --

MR. AYRES: The rule-making.

QUESTION: -- and not the licensing?

MR. AYRES: Right. And so we are unconcerned for Vermont Yankee has the license, and we didn't, as I noted, file any sort of appeal on the grant of that license.

QUESTION: Well, why do you bring it up now?

MR. AYRES: Why do we bring up --

QUESTION: Yes.

MR. AYRES: -- Vermont Yankee?

QUESTION: No, the fact that they already had this additional interim license. You say it doesn't mean anything.

MR. AYRES: It does mean something, we think. It means that there are --

QUESTION: It means that he lost a 40 and got an 18-month.

MR. AYRES: But they are I think assured on the basis

of that reasoning of an ultimate license also.

QUESTION: You mean an 18-month is as good as a 40-year license?

MR. AYRES: Given the reasoning in this opinion and given the direction the Commission is going, yes, it is.

QUESTION: Well, how in the world can you say that? What was the sense of getting a forty-year one in the first place?

MR. AYRES: Well, they brought -- you have to recall, this proceeding has been going on now for six years. It arose when Vermont Yankee sought an operating license and the parties who are now the respondents before you --

QUESTION: In 1969?

MR. AYRES: Well, '69 is perhaps when it started. The parties went before the Commission to ask that the Commission address the environmental effects of the waste disposal and reprocessing of the waste from this plant. The Commission refused to consider that issue. The parties who are now before you sought review in the Court of Appeals. The Commission then changed its position and said we take it back, these are issues that should be before the Licensing Board when it looks at the environmental impact of any given power plant, however, we are going to hold a different kind of proceeding, we are going to have a rule-making proceeding and look at this issue generically.

When that generic proceeding was complete, the respondents sought review of that issue also, and the court brought the two cases together and decided them. In other words, the original license given to Vermont Yankee was given with no consideration of the environmental impact of waste, even though later that was --

QUESTION: And now you go back to the licensing, that is the '72 point, right, or the '69 point?

MR. AYRES: The Court of Appeals had before it whether Vermont Yankee's license was properly granted.

QUESTION: I am asking the result of the Court of Appeals decision in this case. You go back to the licensing point, am I correct?

MR. AYRES: Well, let me clarify slightly. The Court of Appeals' opinion remanded the license for Vermont Yankee pending the outcome of further proceedings by the Commission to establish an adequate record on the issue of waste disposal.

QUESTION: Well, if it took nine years before, why won't it take that long now?

MR. AYRES: Well, it didn't take nine years.

QUESTION: How long did it take, from '72 to '70-what?

MR. AYRES: The Commission undertook the rulemaking involved in this case in 1972 --

QUESTION: But the case was started in '69.

MR. AYRES: No, the case that --

QUESTION: The application?

MR. AYRES: The case that involves Vermont Yankee was started in 1971.

QUESTION: In 1971.

MR. AYRES: 1971. That case --

QUESTION: And now it is 1977.

MR. AYRES: That case has taken this long only because the Commission has gone through a separate rule-making proceeding, it has complicated the issues.

QUESTION: Well, couldn't they do it again?

MR. AYRES: But the Vermont Yankee license has been remanded pending the Commission's taking a serious look at the waste disposal issues.

QUESTION: Your position then is that your client did appeal from the actual granting of the license in '72 within the 60-day period?

MR. AYRES: There is no question about that. There is no issue about that at all. But because of the Commission's reversal of position, its decision that waste disposal issues were valid issues to be considered and its subsequent proceedings, two separate cases came before the Court of Appeals on essentially the same general issues, and the one which you have accepted cert on is the one that involves Vermont Yankee's license. There was also a petition, as you probably recall,

for review of the court's decision as to the Commission's rule-making. That petition was not granted. So the issue before you here is whether Vermont Yankee was properly or improperly granted that license, and it is related to the rule-making only insofar as Vermont Yankee's license now depends on the outcome of the rule-making.

QUESTION: And if we uphold the rule-making proceeding, does it necessarily follow that Vermont Yankee's license is also valid?

MR. AYRES: No, it does not.

QUESTION: Why not?

MR. AYRES: Well, Vermont Yankee's license was held invalid because the Commission gave no consideration whatever to the environmental impact of the waste that would be produced at that plant. In the rule-making proceeding, the Commission had agreed that that was in error, that it was supposed to look at the waste that arose from that plant and try to look at what the environmental impact of those would be. However, in effect it simply said we won't relook at any plants that we have looked at before. The case, however, had already been filed as to Vermont Yankee. Indeed, it was the filing of that case which spurred the Commission to change its position. So that case came before the Court of Appeals on the issue of whether or not a license could be issued to a plant with no consideration whatever given to the environmental impact of

the waste that that plant would produce.

QUESTION: And the Court of Appeals sent it back and the Commission did consider ineptly or not properly in your view though waste production in a rule-making proceeding?

MR. AYRES: No, they were separate and unrelated until they came before the court. They came before the court at the same time. The Vermont Yankee case poses the issue of whether a plant can be licensed with no consideration whatever of the environmental impact of the waste that that plant will produce. The rule-making proceeding is one in which the Commission agreed that that position is in error, they agreed that they had to look at the environmental effects of waste. It then, however, conducted what we consider to be an extremely cursory examination of the issue, and we then appealed that rule-making to the Court of Appeals. The Court of Appeals decided both cases together.

It held in the first instance that licensing a plant with no consideration of waste was clearly a violation of NEPA, the National Environmental Policy Act. It also held that the Commission's rule-making had not provided an adequate investigation laying out on the public record of the environmental hazards associated with reprocessing of spent nuclear fuel and with the ultimate disposal of the wastes that are produced at the power plant.

QUESTION: But wasn't the Commission's determination

in the rule-making proceeding that Vermont Yankee's license should be continued to be valid?

MR. AYRES: No, the rule-making proceeding was conducted completely separately from the Vermont Yankee proceeding.

QUESTION: Well, what is the Commission's present position, as you understand it, on the validity of Vermont Yankee's license?

MR. AYRES: I think the Commission's present position is stated in the opinion which I provided to you last week, which grants Vermont Yankee its license based on this interim rule, but clearly indicates also that the Commission's view is that Vermont Yankee is grandfathered. And as I said, my client is not concerned that that should occur.

QUESTION: And you say if it hadn't been for this subsequent proceeding, Vermont Yankee wouldn't have any license at all, even though we were to reverse the Court of Appeals?

MR. AYRES: I'm sorry, I didn't understand.

QUESTION: You say that if it weren't for this subsequent proceeding in July of this year, that Vermont Yankee wouldn't have any license?

MR. AYRES: That's right, the Court of Appeals decision is that Vermont Yankee's license must be remanded pending an adequate investigation and laying out on the public record of the waste issues.

QUESTION: Yes, but if we reversed the Court of Appeals, Vermont Yankee would have the license that it was given in 1973 or whenever it was?

MR. AYRES: Let's be clear. There are two --

QUESTION: For forty years.

MR. AYRES: There are two decisions. If you reverse the Court of Appeals in the Vermont Yankee case --

QUESTION: In the Vermont Yankee case, Vermont Yankee has its license.

MR. AYRES: That's right.

QUESTION: That was given years ago.

MR. AYRES: Yes. That decision could be made and essentially on grandfather grounds.

QUESTION: It could be made on a variety of different grounds. In any event, if the Court of Appeals is reversed in the Vermont Yankee case, then Vermont Yankee has the license that was originally accorded.

MR. AYRES: That's correct. I'm sorry if I seemed dense about that. There is no question about that.

QUESTION: And you have no objection to that, I assume?

MR. AYRES: We have no objection to Vermont Yankee's having a license.

QUESTION: I mean you have no objection to our reversal and reinstating the Vermont Yankee license?

MR. AYRES: Oh, we have a great deal objection to reversing. We see the issue here is whether the Commission has properly examined the waste issues under the National Environmental Policy Act, and we point out that the court saw it that way also. The court said we don't presume to tell you what procedures should be used. We are not presuming to tell you whether the procedure should be rule-making or adjudication, but we do presume to tell you that based on what we see here, (a) a case in which a plant is licensed with no consideration, and (b) a rule-making in which the Commission essentially gave no consideration to the basic questions that have been raised by most of the major non-nuclear regulatory commission people who have looked at this issue. We cannot agree that that is adequate consideration of these issues under the National Environmental Policy Act.

QUESTION: These issues are, what, the environmental effect of the so-called back-end part of the nuclear cycle?

MR. AYRES: There are two basic issues. One is that it has been assumed that the fuel, the spent fuel from nuclear reactors would be reprocessed and plutonium would be extracted from that fuel to be used in turn as fuel for future reactors.

Recently, a major Ford Foundation study, as one example, criticized that decision because of the fear that once plutonium is purified, it is easy to steal, to divert either by a technologically backward nation or by a terrorist group,

and the technology to produce a crude bomb is widely known. It can easily be done.

The President of the United States last spring, based on that reasoning, decided that reprocessing shouldn't go forward. The second issue is the disposal of the waste themselves. The waste themselves include elements which are radioactive for periods ranging from hundreds of years to literally hundreds of thousands of years. So the issue is how to isolate those wastes from all life, human and otherwise, for periods that range anywhere from a thousand years to a quarter of a million years.

There have been studies published in the last two or three years by the Massachusetts Institute of Technology, Cal-Tech, the British Royal Commission, the General Accounting Office, and a House committee, all of which conclude that the Commission has failed to solve that problem, has failed to demonstrate any means for isolating nuclear waste from the environment.

QUESTION: And the Commission, what is happening so far is that so-called temporary storage of a hundred years?

MR. AYRES: Well, no such temporary storage is occurring either, Your Honor. What is actually occurring is that because there is no solution, temporary, hundred-year, or long-term which has been demonstrated at this point, the spent reactor fuel is being stored in spent fuel pools on the site of

the reactor which were designed to hold the fuel for a matter of two or three months before it was shipped off to be taken care of. This is a problem which has been considered by everyone but the Nuclear Regulatory Commission as perhaps a critical problem concerning whether nuclear power should be pursued.

QUESTION: Well, that is all a matter under the law of separate and subsequent licensing?

MR. AYRES: Well, the Commission's view is that they can look -- it is because this issue occurs in every plant, they will look at the issue once generically --

QUESTION: And make a rule which incorporates a curve, right?

MR. AYRES: Which incorporates a table of figures, yes.

QUESTION: Yes.

MR. AYRES: The point is though that two things are done by that. One, by convening a rule-making proceeding, the agency has curtailed the usual procedural rights that occur, that are given to intervenors on safety issues, on environmental issues in the usual licensing of the plant.

QUESTION: Well, do you say that the preparation of a NEPA statement requires an adjudicatory hearing or that the licensing issue requires an adjudicatory hearing?

MR. AYRES: The Commission prepares an --

QUESTION: I was curious to know what you said, what your position is.

MR. AYRES: Well, the Commission ordinarily prepares an environmental impact statement for each plant. That environmental impact statement is then taken into account in the licensing and during that proceeding any party to the proceeding is afforded the usual full panoply of adjudicatory rights, cross-examination, and so forth, as to the environmental impact statement and the statements that are made there, as well as to the safety issue.

QUESTION: Do you think that is required by statute?

MR. AYRES: No. What I am saying is that the Commission, in convening a generic rule-making proceeding, they have restricted those rights. I do think that the National Environmental Policy Act requires that the Commission explore the issues. Whether it be by that kind of procedure or not, I don't think that the --

QUESTION: Do you think you need anything as open to the public as rule-making for the preparation of a NEPA statement if you are not doing a separate adjudication?

MR. AYRES: Oh, I think the rule-making that was given here clearly was not open enough to explore the issues. I think --

QUESTION: Well, what is your authority for that from this Court?

MR. AYRES: Well, I think if one looks at the pages of the record --

QUESTION: I mean what is your authority, decisional authority from this Court that the preparation of any NEPA statement must conform at least with the rule-making standards of the APA?

MR. AYRES: Well, Your Honor, that is not the proposition that I would support. The proposition that I would support is that the National Environmental Policy Act requires the agency to explore on the public record fully the environmental impact of the proposed action. This rule-making was taken in effect to prepare part of the environmental impact statement for every power plant to be licensed from the on, so it was subject to the same injunction which this Court has stated and many lower courts have, too, that there must be a full analysis of --

QUESTION: Which case of this Court are you relying on for that?

MR. AYRES: Well, I think it has been stated in the Kleppe case, as well as the other NEPA cases that have come before the Court.

QUESTION: Any particular ones by name?

MR. AYRES: I think the Kleppe case is sufficient. I think the critical point about the lower court's decision is that it is focusing on whether there was an adequate

exploration of the issues to meet the standards of NEPA, not to meet the standards of the APA. The APA is involved here and we think that those standards weren't met either, but the key thing is that the duty of the Commission came as a result of the National Environmental Policy Act which requires that there be a full exploration of the issues. That is one of the reasons why we feel the court's decision was not a procedural decision.

QUESTION: But the APA says there are two different ways you can go about conducting hearings. One is if it is a rule-making proceeding, that is 553, and one is if it is an adjudication, and you don't certainly contend that anything more than a rule-making proceeding is required for your ordinary NEPA statement, do you?

MR. AYRES: I think I have a different view of what the NEPA statement's position is, than that suggests. I think the NEPA statement proceeding, particulary one that involves essentially NEPA statements for all future nuclear power licensing requires very thorough exploration of the issues.

QUESTION: What is your authority for that?

MR. AYRES: I think that is in the case law of NEPA.

QUESTION: Well, case law from this Court?

MR. AYRES: This Court and the lower courts.

QUESTION: What from this Court, Kleppe?

MR. AYRES: I think so, yes. I think the lower court's

position clearly was that it was not concerned about procedure, but what it was concerned about was the fact that the procedures that had been used and the way they were used failed to produce an exploration of the issues.

What the Commission basically did was to look at the hypothetical normal operation without any accidents or any other abnormal occurrencies of a hypothetical reprocessing scheme and disposal scheme, and failed to consider altogether the long-term future of attempting to isolate the waste, and it failed also to consider the possibility that something might go wrong, for example, in the case of reprocessing, that a terrorist group or a foreign power might wish to diver a small quantity of plutonium that was necessary to make a weapon.

There is a basic conflict here between the way the Commission has tried to deal with this issue, as if it were a kind of minor concern, and where the rest of the world outside the Commission views it as one of the most important issues of concern about the whole commitment of the nation to nuclear power. And we think the Court of Appeals below in effect was saying that the Commission, you must honestly and above-board and fully explore the issue with the public and let the public know, including its decision-makers, what problems do exist with nuclear waste so that a decision can be made about them.

QUESTION: You feel the Court of Appeals more

adequately divined the state of world opinion than the Nuclear Regulatory Commission?

MR. AYRES: No, I think the Court of Appeals did divine that the Commission had failed to address the kind of major concerns which the petitioners -- I'm sorry, the respondents and others raised to them in the rule-making, and the Commission essentially failed to address them, and those are in fact the same concerns that, as I have mentioned, expert bodies outside the Commission have raised also repeatedly in the last few years as serious problems. We think the Commission in effect just tried to sweep those concerns under the rug and avoid the discussion which NEPA really is aimed at producing so as to produce better federal policies.

QUESTION: I don't know whether it is in your brief, Mr. Ayres, or in the Court of Appeals opinion, but there is the suggestion that there had to be an exhaustive study of all of the alternative methods. Is that in the opinion or in part of your argument?

MR. AYRES: I don't know whether it is in the opinion. I'm not sure whether --

QUESTION: Well, are you making that argument?

MR. AYRES: Well, I think, yes, the notion certainly is that the alternative means of dealing with the problem need to be explored. They are clearly, many of them are, as the Commission admits, are not yet seen in full being they are

still hypothetical. We are not suggesting that the Commission engage in some sort of crystal ball examination, but we are suggesting that the outlines of the potential environmental risks involved in each of those alternatives is reasonably clear and can be laid out on the record.

What the Commission did here was to consider only one hypothetical short-term solution to this problem, no long-term solutions at all. There was no discussion essentially of the dangers that might flow from one alternative as opposed to another.

QUESTION: You say that the Act specificaly requires that the Commission do what you are suggesting?

MR. AYRES: We think, yes, the Act does ask specifically that alternatives be explored and also that the --

QUESTION: But to what extent?

MR. AYRES: To evaluate -- well, there is case law on the question of to what extent.

QUESTION: You are not suggesting that there was no consideration given to alternative mthods at all, are you?

MR. AYRES: Yes, I am.

QUESTION: None whatever?

MR. AYRES: I think if you look at the record, you will see that is correct. There is not even one alternative given as to long-term storage, not one, let alone alternatives to that one. There is one hypothetical, which is no longer

the Commission's policy to pursue, given for so-called short-term storage, and that is the reason why I think the court didn't need the help of experts to divine that the record in this case was insufficient to support the conclusion that the effects of waste were insignificant.

I see my light is on, and I thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Cherry.

ORAL ARGUMENT OF MYRON M. CHERRY, ESQ.,

ON BEHALF OF RESPONDENTS, AESCHLIMAN, ET AL.

MR. CHERRY: Mr. Chief Justice, and may it please the Court:

In the short time remaining and on behalf of the respondents in 76-528, except for the Federal respondents, I would like to state that I would like to rely on Mr. Ayres' argument with respect to the fuel cycle, although I would just like to place on the record the notion that Mr. Justice Stevens suggested, that perhaps the writ was improvidently granted in the event that there is now a moving target with concern to the interim license with respect to the fuel cycle.

With respect to the issues in the Aeschliman case, our position is quite clear and quite direct. We properly appeared before the agency, they acknowledged our present and placed improper legal barriers in our way. The Commission was perfectly willing to have us be present; when we asked for participation, we were told that the issues we were concerned

about were either beyond the scope of NEPA or would not be considered.

QUESTION: Are you talking about the -- you are talking about the non-federal respondents in 76-528 --

MR. CHERRY: That is correct.

QUESTION: -- and who are they?

MR. CHERRY: That involves two cases, Mr. Justice. In one of the cases before involves some citizen group known as the Saginaw Valley Nuclear Study Group, and includes the International Environmental Law Committee of the United Auto Workers, it includes the University of Michigan Environmental Law Society, the West Michigan Environmental Action Council, and that was consolidated with the so-called Aeschliman petitions which were people who lived in the area near the plant and the owner of a motel, the Saginaw and intervenors essentially took the laboring both at the hearings and at the Court of Appeals and the Court of Appeals below consolidated both of those cases for decision and for argument.

QUESTION: Nelson Aeschliman is a businessman or somebody who lives in the area?

MR. CHERRY: Yes, Mr. Justice Brennan, he is a -- Mr. Justice Stewart, pardon me -- he is a businessman who lives in the area and who I believe owns a motel in the area.

QUESTION: And the others are various environmental groups?

MR. CHERRY: Well, the citizen groups, Mr. Justice, involve not only people who live in the community and are very concerned about the development of that particular community, many of them work for Dow Chemical but they also comprise local representatives of national organizations, along with the Sierra Club.

QUESTION: Right.

MR. CHERRY: I think a point to be made is that whatever the court does with respect to the fuel cycle case, it really has no impact upon the Aeschliman case. While the fuel cycle issue was one of the four issues remanded by the Court of Appeals, the ACRS issue, the energy conservation and the Dow cost-benefit analysis, the fuel cycle issue is given a sentence in the Court of Appeals opinion below by sucking in by reference the fuel cycle. And while we believe that the fuel cycle has some importance to the overall administration and regulation of nuclear energy, it has no impact upon the case that was consolidated. Indeed, there was some question in our minds, given the fact that the government opposed the writ of certiorari even if the court took the cert cases and still treats in its brief the issue secondary, whether this Court, not having advised us about what is before the Court, whether those issues are even before the Court.

It is our position that the Court ought to take a long, hard look before it gets involves in a record kind of

case like Aeschliman. In connection with a couple of points made by Consumers Power counsel, I think it is important to bear our, first of all, it is not true that the Dow issue is essentially quiescent.

One again, we have a moving target with respect to these issues. We've gone through a year of remanded hearings. There are new facts before the Commission now, and assuming hypothetically that this Court does choose to reverse the Court of Appeals on Aeschliman, those facts are still before the Commission. The Commission, under 10 CFR 50.100, its general superintendent power, cannot ignore facts in its proceeding forward with that case, and so once again there is a fresh record that may wend its way through the appeal process in the Court of Appeals because we are now dealing with those issues.

But in connection with the Dow issue specifically, there was a decision by the Licensing Board on remand in just September of this year where the Licensing Board of the Commission said, and I quote, "While Dow needs steam, Dow does not necessarily need it from Midland, and whether Dow will ever buy steam from that plant is on this record speculative. Whether these circumstances will change by the time the remanding hearing is concluded isn't possible to know." And then it goes on to suggest that if Dow fails to buy steam, the circumstances will be one of a plant at a site through which only

very limited alternatives were explored.

What has occurred in the process is that consumers ran out of money in the '74-75 period, the amount of funds they have spent now is barely I think 20-22 percent of the amount, and the remanded hearings which this Court would interrupt by reversal of the Court of Appeals are all but over. I would contemplate that those remanded hearings might not last more than six months from when they begin, and they are scheduled to begin as soon as the Appeal Board rules on the interim relationships.

QUESTION: How much of that is before us?

MR. CHERRY: How much of what, Mr. Justice Marshall?

QUESTION: Of what is going on right now.

MR. CHERRY: Well, we have --

QUESTION: How much of that is before us? None, am I right?

MR. CHERRY: Well, it is not before you, Mr. Justice Marshall, in the sense that you are being asked to look at that record. However, it is before you in the sense that we believe it incumbent upon us in our answering brief to update the record and indicate that the Commission has moved forward to comply with the Court of Appeals order, and that task is all but over with. And I am only suggesting, with all due respect, that that process ought to go forward because it involves important issues to the Nuclear Regulatory Commission's

functions which it now all but acknowledges.

In connection with the argument made about our neither raising energy conservation issues or the ACRS being unimportant, I think it is also important to understand that the position of the government and the utility in this case has constantly been changing. For example, on energy conservation, in 1972, the Licensing Board said that the contentions we wanted to raise were beyond our province, that ruling came, that is why we didn't participate in the hearing, because we were told we couldn't deal with those issues.

In 1973, the Appeal Board said that our contentions are well beyond the pale of NEPA. Now, as of 1972, President Nixon already submitted to Congress a comprehensive energy policy. Commissioner Dobb, of the Nuclear Regulatory Commission, in specific actions to the joint committee had dealt with the question of energy conservation. Chairman Schlesinger had given a speech saying that it was a legitimate issue.

So the suggestion that the Commission was not aware of energy conservation as an alternative is really legal trickery and its barring of the issues below is no more than trickery because the Commission was aware of it, the regulatory staff moved very quickly below in the record to force it out, and Consumers obviously made the same issue.

In 1974, it was the first time that the Commission below decided to change what their position was and why they

barred energy conservation. They abandoned the beyond the pale NEPA argument because it was unsupportable, and I think the government's brief admits that, and says that for the first time that we didn't raise our contentions specifically.

Now, stopping right there, you have an agency which says that your contentions weren't specific, that I didn't understand what energy conservation was, that it was beyond the pale of NEPA, that it was an evolving concept.

Well, it can't be all of those things. If we are told that energy conservation needed to be more specific, that undercuts the agency's argument that they didn't know what it was in the first place. I submit that what the Commission has done in this case is really quite important from another circumstance. It has carved out a special rule for the Midland case.

Now, whether the Midland case ought to be built, whether it ought to be built is not before this Court, we are not here to suggest that it is a proper or improper plant necessarily in Midland.

My clients have spent an awful lot of time and money for the sole principle of merely trying to be heard. On the case of the fuel cycle, we were arguing that the Commission may or may not have adequately had the record. We were told we couldn't deal with these issues.

In terms of the ACRS issue, once again, my brothers

treat the issue as one of just blithely it is an advisory committee. We look at it this way, and we hope that the Court will if it decides the reach the question: The Advisory Committee on Reactor Safeguards has a letter. The letter is of some importance. It was before this Court in a similar way in the power reactor case, where this Court recognized that the Advisory Committee on Reactor Safeguards was important, and if the Court recalls in that situation, what the Commission was trying to do was to hide the fact that the advisory committee was against it.

In our situation, we have a letter which said there are other problems unidentified which should apply to the Midland case. Now, I asked questions about what those other questions were, how should they be applied, what due consideration is. We were told that the ACRS was collegial in nature and that we couldn't ask any questions.

The letter was put in for the purpose of proving that the ACRS made a review but then with the catch 22 notion that it wasn't in for the proof of the matter stated. Now, assuming for a moment on the basis of this record --

QUESTION: Well, you wanted to depose the individual members of the ACRS, did you not?

MR. CHERRY: Yes, I did, Mr. Justice Rehnquist. In the power reactor case, the Commission in argument before this Court stated that the ACRS was an important body and that it

might very well be witness in various proceedings. It was with that authority that we moved to depose the ACRS and ask them questions, but our request was borne out of frustration. We couldn't touch the letter. The letter could have been the New York Times or the Washington Post, for all that it mattered, as long as it had the logo ACRS with the proper signature, it went into the record.

QUESTION: Well, do you think Congress intended any more than that?

MR. CHERRY: Well, we believe that Congress intended much more than that. The Nuclear Regulatory Commission has been trying to abolish the Advisory Committee on Reactor Safeguards for some time now. It goes to the Congress each time and it is told no. The legislative history which we have set out in depth in our brief suggests that the Advisory Committee on Reactory Safeguards was necessary in order to make sure that there was a check on the Commission, and the fundamental reason for it was that the letters ought to be public and that they ought to be spread on the record because, after all, what the hearing process concerns is the joint --

QUESTION: And in this case they were made public.

MR. CHERRY: Well, what was made public, Mr. Justice Rehnquist, was the bold statement that the plant could satisfactorily resolve, given due consideration, other problems. The other problems weren't set forth. They were not identified.

The due consideration wasn't spelled out. And my --

QUESTION: All the statute requires is that the letter be spread on the record, isn't it?

MR. CHERRY: Yes, that is true. What the Court of Appeals focused on below is the content of the letter.

QUESTION: Yes, but I wasn't asking what the Court of Appeals focused on, I was asking what Congress focused on.

MR. CHERRY: But we believe that Congress focused on the suggestion that the ACRS come to the public hearing and explain what its position is. As a matter of fact, that was the Commission's position in the power reactor case. It has only been recently when the advisory committee was begun to disagree with the regulatory staff, that the regulatory staff has attempted through the aid of the Licensing Board to prevent examination of these records. In that sense, the Aeschliman case is quite unremarkable, and what I would like to impress upon this Court is that essentially our argument is that a plant is in the process of being constructed now, where no one ever agrees now that its analysis are ever analyzed. Dow Chemical is no longer seriously interested in this plant, it testified on the remanded hearings for the purposes of advising the court that if it could walk away from the plant today, it would. It testified that it had no confidence in either utility in terms of its timing, et cetera.

Our position is only that we are interested in the

hearing. This Court has been stalwart in its protection of that one solid point: The people who come prepared to participate in the judicial process are entitled to be heard in the administrative process. That seal of principle of law is the fundamental position of our country and of the basis of due process of the long line of this Court's decisions. That is all we asked below and that is all we ask here before this Court.

And what is important in terms of the remand proceeding is for these alternatives to be explored. Now, in the brief of Consumers Power before the Court, there is a suggestion made which I am sure is not pressed very strongly, but I would like to make a point about it anyway.

The argument starts out that we spend $325 million on a plant with obviously the tag-end line that this involves substantial amounts of money and the Court ought to be aware of it.

I would like to deal with that issue quite of expressly. First of all, there is a lot in the record as to whether this money is recoverable, whether those were honest amounts, but -- and I might also point out that the amount of the plant was originally conceived at around $500 million, is up to almost $2 billion, so the amounts while perhaps large are not in terms of the total amount of the plant.

But the point I would like to suggest in terms of

the Commission's foreclosure argument is really the same kind of argument being implicitly made by the suggestion that a lot of money was spent. The idea that any amount of money can substantially provide a legal basis for a hankrupt decision is certainly impersmissible. And when we finally reach the Supreme Court or if those issues are not properly before this Court, the Court of Appeals, we did everything we could to get before that court. And if we are told that that point in time, some three or four years later, that the issues were important, they should have been ventilated, and yet then we are told that the amount of money having been spent is important, regulation then amounts to having someone purchase a legal opinion from a reputable lawyer saying that he has in good faith relied upon this and then proceeds to implement the regulation. And that is really what this case is all about, because if this case is reversed in terms of the Aeschliman issues, talk about judicial intervention run rides, we are going to have no federal agency who will be able to regulate because EPA's regulations, the FTC's regulations, the ICC's regulations, every administrative agency which has to rely on importance of finality will surely be turned around.

We submit that the issues of energy conservation are not only important to the country today but they were important in 1970 and there is no basis for the suggestion that the Supreme Court can rely upon a record in this case that the

Nuclear Regulatory Commission did not become aware about.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:34 o'clock a.m., the above-entitled case was submitted.]

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